

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 2865

BY DELEGATE WESTFALL

[Passed March 11, 2023; in effect ninety days from passage.]

1 AN ACT to amend and reenact §24-2H-4, §24-2H-5, §24-2H-6, and §24-2H-8 of the Code of West
2 Virginia, 1931, as amended, all relating to clarifying that the Public Service Commission
3 may enter an order in a distressed or failing utility case requiring corrective measures up
4 to and including an acquisition by an acquiring utility; providing the Commission shall
5 provide the list of potentially unstable water and wastewater utilities to the West Virginia
6 Rural Water Association; providing the Commission staff shall publish annually, by
7 hyperlink, the list of potentially unstable water and wastewater utilities on the commission's
8 homepage; providing that eligibility of a utility to receive state grant funding and federal
9 grant funding in a similar manner as the distressed utility is a factor in determining whether
10 a utility is a capable proximate utility; providing that petitions filed with the commission
11 include factual data supporting the justification for the utility to be considered as a
12 distressed or failing utility; providing that high water loss or unaccounted for water cannot
13 be the sole evidence of a distressed or failing utility; and clarifying that an acquiring utility
14 becomes such only after approval of the necessary operating agreement

Be it enacted by the Legislature of West Virginia:

**ARTICLE 2H. POWER OF COMMISSION TO ORDER MEASURES UP TO AND
INCLUDING THE ACQUISITION OF DISTRESSED AND FAILING WATER AND
WASTEWATER UTILITIES.**

§24-2H-4. Preparation of list of potentially unstable water and wastewater utilities.

1 Annually, at least by November 1, the commission shall prepare a list of water and
2 wastewater utilities that appear to be financially unstable by reviewing annual reports, rate case
3 filings and other financial data available to it. Commission staff shall contact each utility placed on
4 the list and provide advice and assistance in resolving any financial instability or managerial or
5 operational issues that are contributing to the utility's financial instability. The commission shall
6 provide the list of potentially unstable water and wastewater utilities to the West Virginia Rural

Water Association. Commission staff shall publish annually, by hyperlink, the list of potentially unstable water and wastewater utilities on the commission's homepage no later than November 1.

§24-2H-5. Determination of whether a utility qualifies as a “distressed utility”, “failing utility”, or a “capable proximate utility”.

(a) In determining whether a utility is distressed or failing, the commission shall consider the following factors:

(1) The financial, managerial, and technical ability of the utility;

(2) The level of expenditures necessary to make improvements to the water or wastewater utility to assure compliance with applicable statutory and regulatory standards concerning the adequacy, efficiency, safety, or reasonableness of utility service and the impact of those expenditures on customer rates;

(3) The opinion and advice, if any, of the Department of Environmental Protection and the Bureau for Public Health as to steps that may be necessary to assure compliance with applicable statutory or regulatory standards concerning the adequacy, efficiency, safety, or reasonableness of utility service;

(4) The status of the utility's bond payments and other financial obligations;

(5) The status and result of any corrective measures previously put into place under §24-2H-7 of this code; and

(6) Any other relevant matter.

(b) In determining whether a utility is a capable proximate utility, the commission shall consider the following factors:

(1) The financial, managerial, and technical ability of all proximate public utilities providing the same type of service;

(2) Expansion of the franchise or operating area of the acquiring utility to include the service area of the distressed utility;

(3) The financial, managerial, operational, and rate demands that may result from the current proceeding and the cumulative impact of other demands where the utility has been identified as a capable proximate utility; and

(4) Eligibility of the capable proximate utility to receive state grant funding and federal grant funding in a similar manner as the distressed utility; and

(5) Any other relevant matter.

§24-2H-6. Notice to distressed or failing utility and formal proceeding.

(a) A proceeding under this article may be initiated by the commission on its own motion, or by the staff of the commission, or any other person or entity having a legal interest in the financial, managerial, or operational condition of the utility, by filing a petition with the commission that includes all of the factual data supporting the justification for the utility to be considered as a distressed or failing utility that the petitioner has available to them at the time of filing: *Provided*, That high water loss or unaccounted for water shall not be considered the sole evidence of a distressed or failing utility. In any such petition, the utility shall be named as the respondent. The commission shall include, as additional parties, any capable proximate public and private utilities that may be able to acquire the utility.

(b) The commission shall hold evidentiary and public hearing(s) in a location in or within 25 miles of the utility's service area. The commission shall give reasonable notice of the time, place, and subject matter of the hearing as follows:

(1) Issuance of a press release;

(2) Written notice by certified mail or registered mail to:

(A) The utility;

(B) The Consumer Advocate Division;

(C) Capable proximate public or private utility or utilities that were made parties to the proceeding; and

(D) The county commission if the utility is a public service district; or

(E) The municipality if the utility is owned and operated by the municipality.

(3) The utility shall give notice to its customers of the time, place, and subject matter of the hearing either as a bill insert or printed on its monthly bill statement as ordered by the commission.

(c) The public hearing shall be conducted to receive public comments, including, but not limited to, comments regarding possible options available to bring the distressed or failing utility into compliance with appropriate statutory and regulatory standards concerning actual or imminent public health problems or unreasonable quality and reliability service standards. At the evidentiary hearing, the commission shall receive evidence to determine if the utility is a distressed or failing utility and whether a capable proximate utility should acquire the utility. If there is more than one capable proximate utility, then sufficient evidence should be presented to allow the commission to determine the appropriate capable proximate utility to acquire the distressed or failing utility.

§24-2H-8. Commission approval of operating agreement, acquisition price; rates for distressed and failing utilities; improvement plan; debt obligations; cost recovery.

(a) After an order has been entered pursuant to §24-2H-7 of this code, the distressed utility and another acquiring public utility shall file a petition with the commission under §24-2-12 of this code to approve the necessary operating agreement if such alternative is directed by the commission. After an order has been entered pursuant to §24-2H-7 of this code, the failing utility and acquiring utility shall file a petition with the commission under §24-2-12 of this code, to approve the purchase price of the acquisition. Where the parties are unable to agree on an acquisition price, the filing may request that an evidentiary hearing be held so that the commission may determine the acquisition price and any other issues related to the acquisition. The acquisition price must, at a minimum, satisfy all outstanding loans, tax obligations, required grant repayment, liens, and indebtedness owed by the failing utility or the acquiring utility must agree to assume the indebtednesses if legally permitted. The acquiring utility shall consult with the

lenders or lienholders regarding payment in full or the assumption, to the extent legally permissible, of any outstanding obligations of the failing utility.

(b) The parties to an acquisition may propose to the commission other methods of determining the acquisition price.

(c) As part of the proceeding, the acquiring utility may propose to the commission that it be permitted for a reasonable period of time after the date of acquisition, to charge and collect rates from the customers of the failing utility pursuant to a separate tariff, which may be higher or lower than the existing tariff of the distressed or failing utility, or may allow a surcharge on both the acquired and existing customers. A separate tariff or rate filing must be made by the acquiring utility before the commission will consider any increase in rates or allow a surcharge to be placed on the acquiring utility's acquired or existing ratepayers.

(d) As part of this proceeding, the acquiring utility shall submit to the commission for approval a plan, including a timetable for bringing the failing utility into compliance with applicable statutory and regulatory standards, including, but not limited to, plans for regionalization. The acquiring utility shall have previously obtained the approval of the plan from the Department of Environmental Protection and the Bureau for Public Health, as applicable, and those agencies are directed to use their full discretion in working towards long-term solutions that will support compliance. The failing utility shall cooperate with the acquiring utility in negotiating agreements with state and federal agencies, including, but not limited to, negotiation of hold harmless agreements, consent orders or enforcement moratoria during any period of remediation. In addition, the failing utility shall cooperate with the acquiring utility in obtaining the consent of the failing utility's and the acquiring utility's bondholder(s) to the acquisition. The acquiring utility must present to the commission as part of its financing plan, documentation on how the failing utility's indebtedness will be paid or assumed.

(e) A nonprofit acquiring public utility may seek grant funding from the Distressed Utilities Account established pursuant to §31-15A-9(i) of this code to repair, maintain, and replace the

38 distressed water and wastewater utilities facilities as needed. The reasonably and prudently
39 incurred costs of the acquiring utility shall be recoverable in rates as provided in §24-2H-9 of this
40 code.

41 (f) If the distressed or failing utility is a public service district, then the commission shall
42 make a recommendation to the respective county commission(s) with regard to the acquisition of
43 distressed or failing utilities as provided in §16-13A-2(a)(2) of this code. If the distressed or failing
44 utility is a municipal corporation, then the commission shall make a recommendation to the
45 respective municipal council with regard to the acquisition of distressed or failing utilities as
46 provided in §8-12-17 of this code.

47 (g) The capable proximate utility may propose one or more of the cost recovery methods
48 or incentives set forth in §24-2H-9 of this code as part of its petition for approval from the
49 commission.

The Clerk of the House of Delegates and the Clerk of the Senate hereby
certify that the foregoing bill is correctly enrolled.

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Clerk of the House of Delegates

.....
Clerk of the Senate

Originated in the House of Delegates.

In effect ninety days from passage.

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Speaker of the House of Delegates

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President of the Senate

The within is this the.....
Day of, 2023.

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Governor